

GREENING WITH UNCERTAINTY

More stringent revisions to cleanup standards will impede the redevelopment of polluted industrial properties across Ontario.

By John Willms and David DuBois

Last updated in 1996, the Soil, Sediment and Groundwater Standards are the backbone of Ontario's brownfield remediation regulations. Impending changes are making compliance more uncertain than ever and could scare away all but the most sophisticated players.

After minimal outside consultation, the Ontario Ministry of the Environment (MOE) proposed revisions to the standards for public comment earlier this year. A majority of the changes reduced values and were both extensive and controversial. About 90 per cent of the values have shifted, either upward or downward. The ministry has also drafted new criteria for a number of contaminants that don't appear in the current standards. The 60-day period for public comments closed on May 22, 2007.

Not surprisingly, the proposals have triggered tremendous unease among consultants, developers, property owners and other players in the brownfields sector. Dan Bunner, a senior project manager at Golder Associates in Ontario, says his firm immediately undertook

a comparison of the current and proposed standards and provided detailed comments to the MOE.

"We asked for the justification for some of the new standards. We wanted to know just where they were pulling the numbers from," says Bunner. "We also pointed out a number of simple mistakes and transcription errors."

Currently, less than 10 per cent of redevelopment projects need to complete a formal risk assessment in order to obtain and file a Record of Site Condition (RSC). The RSC, when certified by a qualified professional, certifies that a property meets the Soil, Sediment and Groundwater Standards appropriate for its intended new use. Formal risk assessments are complex and costly. They determine the ecological and health risks posed by the contaminants on site. A formal risk assessment requires pre-submission and final acceptance by the MOE.

The ministry has estimated that under the proposed standards more than half of all brownfields projects would require risk assessments. However, many experts believe that the number needing risk assessment could be as high as 80 or 90 per cent. This could mean that it will no longer be economically feasible to redevelop many small sites. Moreover, experts fear that the MOE lacks the staff and resources to process more risk assessments in a timely manner. This could mean lengthy or unpredictable delays for developers who require RSCs.

"There is already a strong emphasis on moving towards risk assessment," says Brian Betts, a brownfields specialist based in Ontario. If the new standards come into play, risk assessment is going to become the rule rather than the exception. "I think that the industry is mature enough to understand what risk assessment is and how it is done," says Betts. "The trick will be to address risk assessment early enough in the redevelopment process."

Whereas many in the brownfields sector strongly urged the province to

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toss out the new standards and start over from scratch, the MOE seems determined to plow ahead with the revisions. “We have received a lot of comments, and a lot are good constructive technical comments, from the EBR Environmental Registry posting,” says Marius Marsh, a brownfield soils specialist with the MOE Standards Development Branch. “It is difficult to put a timeline on when the review will be completed, as there are a lot of technical issues raised that need to be looked at very carefully. Standards Development Branch is systematically working its way through the comments it has received, one-by-one. Where necessary, staff members are contacting commentators for further clarification. This is a very complex document, and we anticipate it will take a while longer.”

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“At this stage MOE is considering whether or not there would be another posting on the Environmental Bill of Rights (EBR) for consultation,” says Marsh. “This decision would be made in the future depending on the nature of the changes resulting from the posting as well as on other factors.”

In the meantime, Bunner is warning any of his clients planning to purchase property, apply for building permits or look for financing that “the goal posts may be moving.” Developers should make sure they obtain the necessary approvals before the new standards take effect. Over the longer term, developers must be aware of how the proposed standards could increase the complexity or affect the financial viability of a project. “That’s something to consider in the negotiations, perhaps

justifying a discount in the purchase price,” says Bunner.

Not all of the proposed standards are more stringent. “We have one project that under the current guidelines would require remediation, but under the proposed standards would not,” says Betts. “We are advising the client to hold off on any on-site work until the new standards are finalized.”

The industry has been told they’ll have a grace period of 18 months to two years after the final standards have been promulgated before the onerous new risk assessment provisions will take effect. “In any event, we are telling our clients to get on with filing their Record of Site Condition,” says Bunner. “Get it done now. Get it done early, so you won’t have to worry about the new standards whenever they arrive.”

In our view, lawyers and consultants are obliged to discuss the proposed new standards while advising their clients on compliance with the existing standards or risk liability claims. While debate continues over the validity of individual criteria, the sector’s biggest concern is when, or even if, the new standards are going to be implemented. “We hear lots of rumors,” says Betts, “but are we looking at a three-month window, a three-year window, or are they going to be shelved altogether based on the negative comments the ministry has received?” In other jurisdictions, brownfields markets are buoyant and flourishing. A commitment from MOE to a clearly defined process for revising the standards could defuse some of the uncertainty in the Ontario brownfield marketplace. Until the uncertainty regarding revisions to the standards is resolved, brownfield developers in Ontario need to factor the worst case scenario into their business assessments. 🍀

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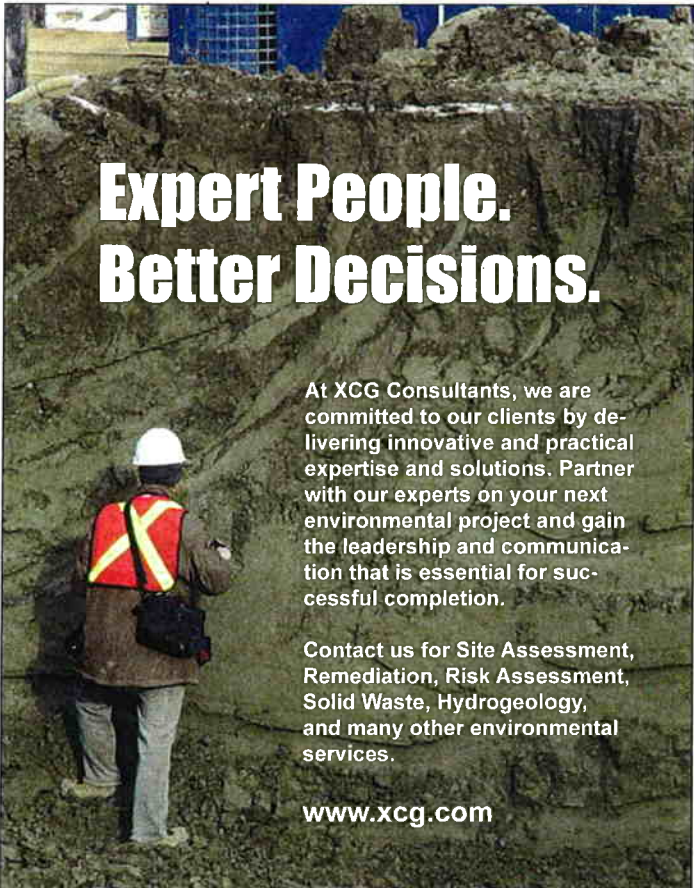


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